UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

WINDWARD TEACHERS ASSOCIATION,
NYSUT, AFT, AFL-CIO

and Case 2-CB-19578-1

WINDWARD SCHOOL

Terry-Ann Cooper, Esq.,
for the General Counsel.
John L. Schlechty, Esq.,
of Elmsford, New York,
for the Respondent.
Scott A. Gold, Esq.,
(Schulte, Roth & Zabel, LLP),
of New York, New York,
for the Charging Party.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge. On December 9, 2003, a charge in Case No. 2-CB-19578-1 was filed against the Windward Teachers Association, NYSUT, AFT, AFL-CIO, Union or Respondent herein, by the Windward School, Charging Party or Employer or school herein.

On October 26, 2004, the National Labor Relations Board, by the Regional Director for Region 2, issued a complaint alleging that Respondent violated Section 8(b)(3) of the National Labor Relations Act, herein the Act, when it failed and refused to honor the Employer's request to execute a written contract embodying the complete agreement it had reached with the Employer on the terms and conditions of employment.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me on February 28, March 2, and March 3, 2005 in New York City.

Upon the entire record in this case, to include post hearing briefs submitted by Counsel for the General Counsel, Counsel for Respondent, and Counsel for the Charging Party and giving due regard to the testimony of the witnesses and their demeanor, I make the following

I. Findings of Fact

At all material times the Charging Party or Employer has operated a private independent school, located in White Plains, New York.

Respondent Union admits, and I find, that at all material times the Charging Party Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization Involved

Respondent Union admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practice

A. Overview

The Windward School is a private independent school located in White Plains, New York. The Union has represented a unit of employees at the school since 1988. The unit of employees the Union represents is as follows:

> "All full-time and part-time professional employees, including the computer teacher and the librarian, and the full-time maintenance and custodial employee. Excluded: the Head of School, Business Manager, Division Heads, clerical employees, Dean of Student Activities, Guidance Counselor, School Psychologist, Director of Education, Director of Development, Director of Admissions, Director of Communications, Director of Athletics, Director of Finance and Operations, Director of Special Services, Speech/Language Therapists and guards and supervisors as defined in the Act."

The most recent collective-bargaining agreement between the parties was effective from July 1, 1998 to June 30, 2003.

Beginning in May 2003 the parties began negotiations for a successor collective-bargaining agreement.

The parties had a total of eight negotiating sessions. The first session was held on May 20, 2003 and the last session was held on September 3, 2003.

At the last two negotiating sessions the parties had the assistance of a mediator.

On September 3, 2003 both parties believed that they had reached a complete agreement on a successor contract. After ratification by the union membership on September 10, 2003 and by the Board of Trustees of the school on September 17, 2003 the Employer implemented the terms and conditions of employment contained in the agreement which included pay raises for unit employees.

Counsel for the employer on November 3, 2003, having earlier sent copies of the collective-bargaining agreement to the Union, which agreement was to run for a 5-year term from July 1, 2003 to June 30, 2008, requested that the Union sign the agreement. On or about

November 11, 2003, the Union refused on the grounds that the written agreement did not accurately reflect the agreement reached by the parties.

The Employer filed a charge with the National Labor Relations Board, which issued a complaint alleging that the Union violated Section 8(b)(3) of the Act when it refused to sign the agreement agreed to by the parties.

Section 8(b)(3) of the Act provides as follows:

> "It shall be an unfair labor practice for a labor organization or its agents to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)."

Section 8(d) of the Act provides, in part, as follows:

> "(d) [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement of any question arising thereunder, and <u>the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession</u>. . . ." (Emphasis Added)

The dispute between the parties boils down to a disagreement over a new Paragraph 12K of the agreement. The language in the contract which the employer claims was agreed to is as follows: "The School has the right to pay bonuses without Union approval." The Union claims that the parties agreed to that language provided the granting of bonuses was fair and equitable and across the board. The employer takes the position that the language puts no conditions on the employer when it comes to granting bonuses.

It is my finding that there was no meeting of the minds on Paragraph 12K and, therefore, there was no complete agreement on the terms and conditions of employment and the Union did not violate Section 8(b)(3) of the Act when it refused to sign the collective-bargaining agreement. Had there been complete agreement, which there was not, the Union's refusal to sign the agreement would be a violation of the Act. See, *Teamsters Local 617 (Christian Salvensen),* 308 NLRB 601, 602 (1992).

B. Discussion

The parties agree that when negotiations began that in addition to economics the two major issues were the school's desire to have individual employment contracts with its teachers, so the school would know who would be returning to teach the following school year and school's desire to do away with the union security clause in the contract, because the school thought some prospective teachers they may want to hire in the future would not want to become members of a union. The school also wanted to clean up some language in the contract to be more consistent with the practice of the parties.

Suffice it to say the parties reached an agreement on the issue of individual contracts by agreeing to a new Article XIX which provided as follows:

“ARTICLE XIX
INDIVIDUAL CONTRACTS

Each non-probationary faculty member covered by this Agreement shall have an individual employment contract in the form attached as Exhibit 2. It is understood and agreed that the intent of this section is to provide the School with sufficient notice of a faculty member’s decision not to return for the following school year to enable the School to competitively participate in the hiring of prospective new faculty. In return, the School will agree to employ the faculty member for the following school year notwithstanding lack of enrollment. Nothing herein shall supersede Article VI of this Agreement. This section shall not apply to assistant teachers.

Accordingly the parties have agreed to the following timetable:

February 15th: the School shall offer a contract for the following school year to all non-probationary teachers and to all probationary teachers about whom there is no evaluative concern under the provisions of the Agreement and for whom a position is expected to exist.

March 1st: faculty shall return a signed contract or request an extension in writing. In those cases, the School shall grant a one (1) month extension.

April 1st: faculty who were granted extensions shall return a signed contract. If the staff member does not return a signed contract, the School shall be free to fill the positions which have not been accepted.

If a teacher has executed an individual employment contract for the following school year, it shall be a breach of contract for the teacher to subsequently accept a position with an educational institution within a one-hundred mile radius of the West Red Oak Lane Campus. The School agrees that it will not pursue legal remedies with respect to the breach of contract against the individual teacher.”

The old contract (July 1, 1998 – June 30, 2003) contained the following article regarding union security:

“ARTICLE II
MEMBERSHIP AND PAYMENT OF DUES

MEMBERSHIP

Windward School and WTA agree that as a condition of employment all employees within the scope of the bargaining unit shall become members of WTA within thirty (30) days after commencing employment.

1. All employees who become members of WTA shall remain members during the life of the Agreement.

2. Upon receiving a signed statement from WTA indicating that an employee has failed to comply with the above conditions, said employee’s services shall be discontinued within two (2) working days after receipt of notification.

Refusal to join WTA is recognized as just and reasonable cause for termination of employment.

3. This provision does not affect employees hired for summer or after school activities.

MAINTENANCE OF FEES AND ASSESSMENTS

All fees for Union membership, as prescribed in the constitution and bylaws of WTA shall be deducted in equal amounts from each payroll check of each member and remitted promptly to NYSUT by Windward School.

1. The permission to retain the fees and assessments shall be granted through the signing of agreed upon authorization cards.

2. The granting of authorization shall indemnify Windward School against any and all claims or other forms of liability that may arise out of such authorization. Further WTA holds Windward School harmless for any sums so deducted as to any and all liability as a result thereof.

3. The withdrawal of authorization may be accomplished only through the termination of the Agreement, or through written notification, to both the Windward School and WTA, of his/her desire to withdraw such authorization three (3) days prior to the annual anniversary of the granting of such authorization. Otherwise, the granting of such authorization shall remain in effect during the life of this Agreement.

4. The authorization cards shall consist of the following form:

Last Name _________________ First Initial _________ Initial _________

TO: Windward School

I hereby request and authorize Windward School according to arrangements agreed upon with WTA to deduct, in equal amounts from each payroll check, all fees as certified by WTA to be required by the constitution and bylaws of WTA. I hereby waive all right and claim for monies so deducted and transmitted in accordance with the authorization and relieve Windward School from any liability for said sums. The right to withdraw this authorization shall exist only during the three days preceding the anniversary of this authorization through the use of a written instrument. Otherwise, this authorization shall be continuous for the duration of the contract.

________________________________ ________________”

Employee Signature Date

The parties reached an agreement to modify the above union security clause. The language agreed to by the parties was as follows:

“ARTICLE II
MEMBERSHIP AND PAYMENT OF DUES

MEMBERSHIP

Windward School and WTA agree to an Agency Shop. As a condition of employment all employees within the scope of the bargaining unit shall elect within thirty (30) days after commencing employment either to join the union or to pay to the WTA its cost of representation (but not costs or fees relating to the Union’s political and other non-representational activities).

1. Only members of the Union or non-members paying the agency fee may be employed or continue to be employed. Upon receiving a signed statement from the WTA indicating that an employee has failed to comply with the above conditions, said employee’s services shall be discontinued within two (2) working days after receipt of notification.

2. This provision does not affect employees hired for summer or after school activities.

3. No member of the faculty shall be discriminated against because of membership or non-membership in the Union.

MAINTENANCE AND FEES AND ASSESSMENTS

All fees for Union membership or for non-members paying the agency fee, as prescribed in the constitution and bylaws of WTA shall be deducted in equal amounts from each payroll check of each employee and remitted promptly to WTA by Windward School.

1. The permission to retain the fees and/or assessments shall be granted through the signing of agreed upon authorization cards in the form attached hereto as Exhibit 1A (Membership) and 1B (Non-membership).

2. The granting of authorization shall indemnify Windward School against any and all claims or other forms of liability that may arise out of such authorization. Further WTA holds Windward School harmless for any sums so deducted as to any and all liability as a result thereof.

3. The withdrawal of authorization may be accomplished only through the termination of the Agreement, or through the member’s written notification to both the Windward School and WTA or his/her desire to change authorization.

EXHIBIT 1A
AUTHORIZATION FOR MEMBERSHIP

Last Name __________________ First Name ____________ Initial ______

TO: Windward School

I hereby request and authorize Windward School according to arrangements agreed upon with WTA to deduct, in equal amounts from each payroll check, all fees as certified by WTA to be required by the constitution and bylaws of WTA. I hereby waive all right and claim for monies so deducted and transmitted in accordance with the authorization and relieve Windward School from any liability for said sums. The right to withdraw this authorization shall exist only during the three days preceding the anniversary of this authorization through the use of a written instrument. Otherwise, this authorization shall be continuous for the duration of the contract.

____________________________ ____________________
Employee Signature Date

EXHIBIT 1B
AUTHORIZATION FOR NON-MEMBERSHIP

TO: Windward Teachers Association, NYSUT, AFT, AFL-CIO

To Whom it May Concern:

Pursuant to Article II of the collective-bargaining agreement between the Windward School and the Windward Teachers Association, NYSUT, AFT, AFL-CIO ("the Union"), the undersigned hereby elects not to be a member of the Union.

Accordingly, I will only pay the cost of representation and it is agreed that the Union shall rebate to me all costs and fees relating to the Union's political and other non-representational activities.

Sincerely,

____

cc: Windward School"

The parties reached agreement on these two very contentious issues, i.e., individual contracts and changing to an agency shop. The parties, by the end of the last negotiating session, reached an agreement on economics.

The chief negotiator for the school was attorney Mark Brossman. He was assisted by Dr. Daniel Kahn, the Assistant Head in charge of planning and resources at the Windward School and two members of the Windward School's Board of Trustees Mrs. Leigh Garry and Bill Jacoby.

The chief negotiator for the Union was attorney Dennis Derrick, a former school teacher who was facing major surgery, i.e., a kidney transplant, right after the negotiations ended. He was assisted by Union President Larry Crosby, who is also a teacher at the school, and several other teachers at the school, i.e., Lisa Bambino, John Vermette, Mara Cohen, Beth Foltman, and Kaarina Bauerle.

At the negotiating session on June 24, 2003, Brossman told the Union that he had a proposal that the parties could agree to and then Dr. Kahn said that the school wanted the authority to pay bonuses without union approval if it had extra money. According to the testimony of Brossman, Kahn, and Garry, the Union appeared to agree to this proposal, but said nothing one way or the other and did not condition in any way the school's authority to give bonuses. Board of Trustees member Bill Jacoby did not testify. Lisa Bambino, one of the union negotiating committee members, who later quit her leadership position in the union, likewise testified in the General Counsel's case that the Union agreed to this proposal and did not condition the school's authority to give bonuses in any way.

However, all the other members of the union negotiating team, i.e, attorney Dennis Derrick, Larry Crosby, John Vermette, Mara Cohen, Beth Foltman, and Kaarina Bauerle specifically remember that the Union was agreeing to the school giving bonuses without union approval if the bonuses were fair and equitable and across the board. Derrick, Crosby, Vermette, and Bauerle testified it was Larry Crosby who said the union would have no objection to bonuses if fair and equitable and across the board. Foltman didn't testify one way or the other as to who said it, but someone did and Cohen said someone said it but she wasn't sure who it was. They all agree that Dr. Kahn responded by saying "of course" or "absolutely" when Crosby said ok to bonuses if fair and equitable and across the board.

All the individuals involved in the negotiations on both sides were aware that some years earlier during the first year that Dr. James E. Van Amburg was Head of School, the school had an "extra" $100,000 and gave the same amount bonus ($2,000) to each and every member of the unit returning for the new school year. Accordingly, Crosby's statement after management said it wanted authority to pay bonuses without union approval that the Union would have no objection if the payment of bonuses was fair and equitable and across the board makes sense.

I found Crosby and Derrick to be very credible. Likewise, I fully credit the testimony of John Vermette who is still a teacher at the school, Mara Cohen, who left the Windward School and now teaches in a public school, Beth Foltman, who is no longer represented by the Union, because she has been promoted to the position of Assistant Principal at the school, and Kaarina Bauerle, who still teaches at the school and receives extra compensation because she serves as the coordinator for the third grade teachers at the Windward School. Bauerle is now the Union Vice President since Cohen left the school to teach in a public school. Crosby has been a teacher at the school for over 25 years, Vermette has been a teacher at the school for 16 years, and Cohen had taught at the school for 13 or 14 years before moving on to a public school.

Board of Trustee member Leigh Garry testified as follows:

> "Q. What is your understanding -- the bonuses would be paid without Union approval by the School for what?
>
> A. For whatever the School wanted to pay them for.
>
> Q. In other words they could say "well, you were a better sixth grade teacher than

the other persons; so therefore the other person will get what the contract calls for and you're going to get what the contract calls for plus a bonus"?

A. That was certainly never used as an example.

Q. Okay. Is it your understanding that you could not do that under 12-K?

A. My understanding is that we don't need to ask the Union to approve how we compensate our teachers.

Q. Although all salaries are in the contract, aren't they?

A. Extra Salary.

Q. But is it extra compensation for extra duties? Or is it anything the School wants it to be?

A. I think the Administration and the Board wanted to give our Administration was as much flexibility as possible.

Q. So that they could give a bonus to a teacher for any reason they wanted under the sun?

A. Sure."

Dr. Kahn testified before me on the reasons for the School's bonus proposal in the 2003 negotiations as follows:

"We wanted it I think for two major reasons. (1) We wanted to make sure that we were going to only pay monies that were specified within the contract. We didn't want to pay anything that was outside of the contract. So we wanted to codify everything that was in the past. The other reason is we were very concerned – there is a very competitive market for teachers in independent schools. It is typical that independent schools pay bonuses for exceptional performance or effort or something that's unusual. We wanted to have that same opportunity so that we could be consistent with our competitors. And not knowing what that might be from year to year, we didn't want to have to go back to the Union every single time that somebody took on additional responsibilities or did something additional during the school day. We wanted to be able just to recognize that within the contract, put it in the contract so it would be able to be taken care of. We didn't see this as a big issue because it's standard practice in our business. It's standard practice. So we wanted it for, I guess the two reasons that I just explained."

The testimony of Garry and Kahn at the trial before me as to the meaning of the bonus language was not told to the union during bargaining.

Testimony at the hearing referred to the practice that extra moneys paid to teachers were specified in the contract, e.g., teachers working with school clubs, coaching sports, etc. Some extra money paid to teachers was not specifically covered in the agreement, i.e., moneys for being class coordinators for chaperoning students on out of town trips or overnight sleep-overs.

Dennis Derrick and Lisa Bambino thought the proposed bonus language of Paragraph 12K was to have in the contract language authorizing the payment of extra moneys to teachers for being class coordinators or for doing extra duty like chaperoning a class trip to Boston or Washington.

The rest of the union negotiating team thought that the bonus language of Paragraph 12K was to authorize an across the board bonus in the same amount to each member of the unit as was done during Dr. Van Amburg's first year as Head of School.

Dr. Kahn and Mrs. Garry gave the bonus language a much broader meaning, i.e., the school could pay bonuses for any reason it thought was a good reason.

One thing is clear – there was no meeting of the minds on the bonus language.

It seems clear that the school wanted the authority to pay bonuses without union approval either consistent with past practice such as occurred in Dr. Van Amburg's first year as Head of School or for extra duties not covered in the prior agreement and also wanted the authority to pay bonuses without union approval if something came up which management could not foresee at the time of negotiations, possibly the payment of a bonus without union approval to keep a prized teacher who was tempted to leave the Windward School for a higher paying teaching position elsewhere.

It is also clear that much of the Union negotiating team, i.e., Crosby, Vermette, Cohen, Foltman, and Bauerle, envisioned the payment of bonuses without union approval to be fair and equitable across the board such as was done in Dr. Van Amburg's first year as Head of School.

General Counsel Exhibits 4 and 6 were received in evidence. General Counsel 4 is a 5-page document prepared by Mark Brossman, the chief spokesman for the school, summarizing the employer's proposal and entilled Stipulation of Agreement. It contains a statement under Article III (Compensation) that reads "A new Paragraph K shall be added which shall read as follows: 'The School has the right to pay bonuses without Union approval.'"

Brossman prepared the document prior to the last negotiating session on September 3, 2003, which was long after the June 24, 2003 meeting where the parties discussed the bonus issue and appeared to reach agreement on it, but where I find there was no meeting of the minds. The mediator was not present at the June 24, 2003 session.

At the September 3, 2003 negotiating session, Brossman marked up his copy of General Counsel 4 to reflect the parties' "agreement," and created General Counsel's 6 which purported to be the parties' agreement. The section on Article XII Paragraph K, i.e., bonuses, remained the same as in General Counsel Exhibit 4, i.e, "the School has the right to pay bonuses without Union approval." When the mediator went over the Stipulation of Agreement he said the bonus clause was as agreed to by the parties.

General Counsel Exhibit 6 was sent to the union negotiating committee who reviewed it on September 5, 2003 without catching the problem with the new Article XII Paragraph K, i.e., the missing language that bonuses be fair and equitable and across the board. The union negotiating committee recommended ratification to the membership at a meeting on September 8, 2003 and on September 10, 2003 the membership, in a close vote, voted to ratify the agreement.

Attorney Dennis Derrick prepared a 2-page “Settlement Highlights” paper to deliver at the union membership meeting on September 8, 2003, which is in evidence as Respondent Exhibit 6. There is no mention at all of Article XII Paragraph K, i.e., the bonus language.

After ratification the employer’s lawyer put the collective-bargaining agreement together and sent it to the union for signature. It was at this time that the union members saw the problem with the bonus language.

Union attorney Derrick tried without success to get the Employer to add the language “consistent with past practice” to paragraph 12K, but the employer would not agree and the Union refused to sign the agreement. The language “consistent with past practice” would have covered extra pay for teachers who served as class coordinators or chaperons and would also cover a situation where a bonus was given similar to when a bonus was given during Dr. Van Amburg’s first year as Head of School.

As noted above the school implemented the contract even though the Union would not sign it. Accordingly, the unit employees have received raises, etc.

Since I find there was no meeting of the minds between the employer and the union on the language of the bonus clause, I must necessarily conclude that the parties did not have a complete agreement on terms and conditions of employment and that the Union did not violate Section 8(b)(3) of the Act when it failed and refused to execute the contract sent to it by the employer. This is not a case where the Union changed its mind, but is a case of no meeting of the minds.

Ideally the parties should return to the table and reach agreement on the bonus clause (Article XII Paragraph K). The school’s argument that the Union should sign the contract and grieve the meaning of the language would make sense if the parties had already signed the agreement and thereafter had a disagreement on its meaning, but it is not appropriate prior to execution. The parties should attempt to agree on bonus language. No doubt the Union should have caught this mistake earlier. This is unfortunate, but may be explained by Dennis Derrick’s health problems. A former school teacher himself he entered the hospital for a kidney transplant on September 10, 2003 and returned to work on October 14, 2003 to learn of the problem with the bonus clause. He was out of work again for health reasons from November 19, 2003 to January 2004. Hopefully he is fully recovered.

Conclusions of Law

1. The Windward School is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent, Windward Teachers Association, NYSUT, AFT, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act as alleged in the complaint.

Upon the foregoing findings of fact and conclusions of law and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[1]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C., May 13, 2005.

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Martin J. Linsky
Administrative Law Judge

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.